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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased,
Appellant,

vs.

STATE OF MAINE,
Appellee.

BRIEF

FOR JAMES TURNER, HENRY E. WORCESTER, AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS OF THE ESTATE OF JAMES N. JARVIE, DECEASED, AS AMICUS CURIAE.

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SUPREME COURT OF THE UNITED STATES.

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FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased,
Appellant,

vs.

STATE OF MAINE,
Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for James Turner, Henry E. Worcester and Central Hanover Bank and Trust Company, executors of the estate of James N. Jarvie, deceased, having previously secured permission of the parties in the case at bar, respectfully move this Honorable Court for leave to file the accompanying brief in this action as amicus curiae.

JOHN M. PERRY,
SAMUEL W. FORDYCE,
THOMAS W. WHITE,
HENRY J. RICHARDSON,
Counsel for Executors of Estate of James N. Jarvie, Deceased.

SUPREME COURT OF THE UNITED STATES.

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No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased,
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STATE OF MAINE,
Appellee.

STATEMENT OF CASE.

From the agreed facts it appears that Edward H. Haskell died testate, a resident of Massachusetts, January 8, 1924. At his death he owned stock in the Great Northern Paper Company, a corporation organized and existing under the laws of the State of Maine. His will was probated in Massachusetts, which levied and collected a transfer tax on legacies and distributive shares, made up in greater part of the proceeds of said stock. The State of Maine claimed a tax on the transfer of his shares of stock in the Great Northern Paper Company, which tax, after deducting therefrom the amount paid the State of Massachusetts, amounts to $30,139.88 (R. 5-7). Substantially all of the Great Northern Paper Company's property is located in the State of Maine (R. 10).

QUESTION PRESENTED.

James Turner, Henry E. Worcester and The Central Hanover Bank and Trust Company, executors of the estate of James N. Jarvie, deceased, are interested solely in the question whether a statute imposing an inheritance tax on the transfer of shares of stock owned by a nonresident in a corporation created by the taxing state, and owning property and doing business within that state, violates the due-process clause of the Fourteenth Amendment to the Constitution of the United States.

INTEREST OF THE EXECUTORS OF THE ESTATE OF JAMES N. JARVIE, DECEASED, IN THE QUESTION PRESENTED IN THE CASE AT BAR.

James Turner, Henry E. Worcester and the Central Hanover Bank and Trust Company of New York are the duly appointed, qualified and acting executors of the estate of James N. Jarvie, deceased. Jarvie died on June 21, 1929, while domiciled in New Jersey, and his will was subsequently probated in said state. At his death he owned common and preferred stock in the Missouri Pacific Railroad Company, preferred stock in the St. Louis-San Francisco Railway Company and voting trust certificates of the Kansas City Public Service Company. All of said corporations were incorporated and are existing under Missouri law, and have much of their tangible property in Missouri. The securities representing said stock were not kept in Missouri and were not used as an integral part of any business of Jarvie's localized in Missouri. An inheritance tax, at the rate of 5 per cent, or a total of $25,677.51, was paid on the testamentary transfer of said stock to

New Jersey. The Attorney-General and the Treasurer of the State of Missouri have demanded, and have threatened suit to enforce payment of, a second inheritance tax amounting to $107,204.88 upon this same testamentary transfer, and as authority for their action rely upon the following statutes of Missouri:

Section 570, Revised Statutes Missouri 1929:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, * to persons, institutions, associations or corporations, not hereinafter exempted, in the following cases: *. When the transfer is by will * of property within the state or within the jurisdiction of the state and the decedent was a nonresident of the state at the time of his death."

Section 583, Revised Statutes of Missouri 1929:

"No * corporation * having * under control securities * belonging to or standing in the name of a decedent who is * a nonresident *, including the shares of capital stock * in a * corporation, * shall * transfer the same to the executor, * unless notice of the time and place of such intended * transfer be served upon the State Treasurer and Attorney-General at least ten days prior to said * transfer; nor shall any * corporation * transfer any securities * belonging to or standing in the name of decedent, * including the shares of capital stock * in the * corporation * making the transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the * transfer of such securities * under the provisions of this article unless the State Treasurer and the Attorney-General consent thereto in writing *. Failure to serve such notice * or failure to retain a sufficient portion or

amount to pay such tax or interest as herein provided shall render said * corporation * liable to the payment of the * tax and interest due * upon said securities, * including the charges of capital stock * of * the corporation * making the * transfer, * and in addition thereto a penalty of one thousand dollars *."

These statutes are substantially similar to the statutes of Maine involved in the case at bar.

Believing that the levy of said inheritance tax by the Attorney-General and Treasurer of Missouri is unconstitutional, the executors of Jarvie's estate have brought a suit before a statutory three-judge federal court sitting in St. Louis, Missouri, to restrain the collection thereof. This suit is styled "James Turner et al. v. Stratton Shartel et al.," is numbered 9460, was argued on November 14th, and is now pending before said court for decision.

Said executors, therefore, have a substantial pecuniary interest in the controversy involved in the case at bar.

SUMMARY OF ARGUMENT.

I.

Page

The principles enunciated in the Farmers Loan and Trust case, and subsequently applied in the Baldwin and Beidler cases, should be applied to the inheritance taxation of stock..... 11

(a) The nature of the property involved in the case at bar is the same in all material respects as that of the property involved in the Farmers Loan and Trust, Baldwin and Beidler cases..... 11

The bonds, notes and debts involved in the Farmers Loan and Trust, Baldwin and Beidler cases were intangible choses in action. Stock is also an intangible chose in action. Bonds are not distinguishable from stock for inheritance tax purposes.

Although finespun legal distinctions can be drawn between stocks and bonds, as a practical matter these distinctions are not sufficient to justify different rules for inheritance taxation of these two forms of intangible choses in action. Such distinctions are disappearing. Stocks are now generally regarded as negotiable securities. Reservation of liens for inheritance taxes is inconsistent with treatment and use of them as such.

(b) The maxim "mobilia sequuntur personam" applies to stocks and gives them a proper situs for inheritance tax purposes at the domicile of their owner.. 16

Under Blodgett v. Silberman, stocks have a proper situs for inheritance taxation at the domicile of their owner. All reciprocal states recognize this situs. The law of the domicile governs the distribution of the

property and determines what constitutes the last will of the testator. At such place title passes from the dead to the living. The privilege of succession is there enjoyed.

(c) The view that two or more states may tax on different and more or less inconsistent principles the same testamentary transfer of stock produces discontent among states and has a bad practical effect..... 18

Frick v. Pennsylvania and dictum in Rhode Island Hospital Trust Co. v. Doughton lend support to this view. Reciprocal acts were passed to avoid the evil effect of the rule of these cases. Inheritance taxation by the domicile of the corporation has a bad practical effect—causes delay, loss, expense and great inconvenience to the executors of nonresident's estates. The heaviest burden of such tax is not the payment to the state but the expense of determining the payment. Inheritance taxation of stock at the domicile of the owner does not have such a bad practical effect.

(d) The theories upon which stock may be subjected to an inheritance tax at four places are based upon a wrong premise..... 19

Prior to 1930 authority could be found for the inheritance taxation of bonds and stocks at four places. Such quadruple taxation of bonds and stocks is as startling in the case of the latter as in the case of the former. In regard to both it is based upon a wrong premise. Inheritance taxation of both stocks and bonds should be subject to the same rules. Neither should be discriminated against. Stocks should be protected against multiplied taxation—should be granted the same immunity as other intangibles and tangibles.

(e) The increasing importance of stock in our national life makes protection of it against discrimination and unjust and oppressive taxation a matter of greatest moment..... 21

Primitive conditions have passed as to stock. Dealings in this form of property are conducted on a national scale. Much of the country's wealth is invested in stock. Intangible wealth is increasing. State borders are no longer industrial boundaries.

II.

The doctrine of stare decisis does not prevent this Court from applying the principles of the Farmers Loan and Trust, Baldwin and Beidler cases to the inheritance taxation of stock..... 22

Cases distinguished:

(a) Tappan v. Merchants National Bank..... 23

This case is based on a disregard of the corporate fiction which is no longer sanctioned by this Court, is based on a specific federal statute and involved a property tax.

(b) Travelers Ins. Co. v. Connecticut..... 25

This case is based on specific statutes in force at the time of incorporation, and on the erroneous theory that a foreign shareholder should support the state of incorporation. It involved a property tax.

(c) Corry v. Baltimore..... 26

This case is also based on specific statutes in force at the time of incorporation. It was decided before stock was generally considered, and made, a negotiable instrument, and before intangibles were placed upon

the same basis as tangibles. It, too, involved a property tax.

(d) Baker v. Baker, Eccles Co..... 26

This case did not involve an inheritance tax. The shareholder was not a nonresident.

(e) Frick v. Pennsylvania..... 27

This decision should be confined to the facts and to state statutes similar to those upon which it is based. It was decided before intangibles were placed upon the same basis as tangibles; before Blackstone v. Miller was overruled; and before the theory that an inheritance tax can be levied by the state of incorporation, simply because it created the corporation, was discarded.

(f) Rhode Island Hospital Trust Co. v. Doughton... 29

The statements contained therein are dictum.

Shares of stock do not have a business situs at the domicile of the corporation simply because they are shares of stock.

The Farmers Loan and Trust, Baldwin and Beidler cases should be applied to inheritance taxation of stock even though a nonresident can avoid taxation by transferring his property to a local corporation. The state of incorporation secures an adequate quid pro quo for privileges granted to the shareholder.

ARGUMENT.

I.

THE PRINCIPLES ENUNCIATED IN THE FARMERS LOAN AND TRUST CASE, AND SUBSEQUENTLY APPLIED IN THE BALDWIN AND BEIDLER CASES, SHOULD BE APPLIED TO THE INHERITANCE TAXATION OF STOCK.

All of the considerations and arguments advanced by this Court in support of its decision in the case of Farmers Loan and Trust Co. v. Minnesota, 281 U. S. 204, 74 L. Ed. 371 (January 6, 1930), and subsequently applied in Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056 (May 26, 1930), and in Beidler v. South Carolina Tax Commission, 282 U. S. 1, 75 L. Ed. 131 (November 24, 1930), apply with as great or greater force to prevent the inheritance taxation of stock by the state of incorporation where such stock is owned by a nonresident, has been subjected previously to an inheritance tax by the domicile of such nonresident, and has not become an integral part of any business of the decedent's localized at the domicile of the corporation.

(a) **The nature of the property involved in the case at bar is the same in all material respects as that of the property involved in the Farmers Loan and Trust, Baldwin and Beidler cases.**

It is true that the case at bar involves stock and that bonds were involved in the Farmers Loan and Trust and Baldwin cases, notes in the Baldwin case and ordinary debts in the Baldwin and Beidler cases. However, all such forms of property are ordinary choses in action and were so considered in the cases mentioned above. Stocks have

been so defined in the following cases: Hawley v. Malden, 232 U. S. 1, 12, 58 L. Ed. 477, 482: "* the shareholder's rights * are * in the nature of contract rights or choses in action"; Allen-West Commission Co. v. Grumbels, 129 Fed. 287, 290: "Stock in a corporation is a 'chose in action' "; Church et al. v. Citizens Street R. Co., 78 Fed. 526, 530: "But stocks are mere choses in action *"; Tucker v. Curtin, 148 Fed. 929, 932: "But with reference to matters which like in action, known as 'choses in action,' including shares of corporate stock *"; and Vanstone v. Goodwin, 42 Mo. App. 39, 47: "A 'share' is a species of incorporeal intangible property in the nature of a chose in action."

Bonds are not distinguishable from stock for purposes of inheritance taxation upon the testamentary transfer thereof. Thus, in Blodgett v. Silberman, 277 U. S. 1, 14, 72 L. Ed. 749, 759, this Court said:

> "The question here is whether bonds, **unlike other choses in action**, may have a situs different from the owner's domicile such as will render their transfer taxable for inheritance tax purposes in the state of that situs, and in only that state. **We think bonds are not thus distinguishable from other choses in action.**" (Emphasis ours.)

Moreover, bonds, notes, debts and stocks are all intangible property. Bonds, notes and debts were so classified in the Farmers Loan and Trust, Baldwin and Beidler cases. Stocks have been thus described by this Court in the following cases: Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 81, 70 L. Ed. 475, 479: "In the matter of intangibles, like choses in action, shares of stock *"; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 93, 74 L. Ed. 180, 184: "Here we must decide whether

intangibles—stocks, bonds *." See, also: In re Zook's Estate, Hibbard v. Thompson, 317 Mo. 986, 992, 296 S. W. 778: "* the corporate stock here in question is intangible property"; Cooley on Taxation, 4th Edition, Vol. 2, Sec. 455, page 1006: "'Intangible' personalty includes open accounts, * credits, * promissory notes, * bonds, shares of stock * and the like; where the debt or obligation is the thing"; and Fletcher, Cyclopedia of Corporations, Vol. 5, Sec. 3430, page 5620: "Though shares of stock are property, they are intangible and incorporeal property, existing only in abstract legal contemplation."

No doubt finespun legal distinctions can be drawn between stocks and bonds, but if we look at the inheritance taxation thereof as "an intensely practical matter" it is apparent that these distinctions are not sufficient to justify different rules for such taxation of these two forms of intangible choses in action. Under modern corporate financing distinctions based on the different relations of a bondholder and a stockholder to the corporation are slowly disintegrating. Bondholders are frequently accorded all the powers and privileges in management previously associated with common or preferred stock ownership. Convertible bonds are often issued. And conversely the management privileges accompanying many recent so-called "stock" issues, amount to practically nothing. Bondholders' protective committees manage the corporation in times of adversity. Moreover, it is to be noted that stock is included within the definition of intangibles set out in various reciprocal inheritance tax statutes. Nor do those states which have abolished inheritance taxes on the other intangibles of nonresident decedents make any provision for retaining such a levy or shares of stock. (See 40 Yale Law Journal, No. 1, November, 1930, pages 99, 102.) And then, too, attention should be paid to the fact that cor-

porate difficulties frequently cause the bondholders of today to be the stockholders of tomorrow. Furthermore, as far as negotiability is concerned, the distinctions between bonds, notes and stocks are being rapidly wiped out by the adoption of Uniform Negotiable Instrument and Uniform Stock Transfer Acts. The latter act has been adopted in the following territories and states: Alaska, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia and Wisconsin. (See "The Transfer of Stock," Christy, p. 770, note.) And under the latter act stocks are generally held to be negotiable (see Fletcher, Cyclopedia Corporations, Vol. 6, Sec. 3782, page 6301, and Petty v. Knight-Petty Mercantile Co., 93 Okla. 187, 220 Pac. 835)—liens not expressed on the face of the certificate are disregarded. Even in states which have not adopted the Uniform Stock Transfer Act the tendency is to treat stock as commercial paper. Thus in Vanstone v. Goodwin, 42 Mo. App. 39, 47, the Court said: "By an endorsement in blank and delivery of the certificate the share of stock represented by it becomes payable to bearer. It passes like commercial paper *." And even in such states a transferee for value in good faith takes title to the stock free from latent equities between prior parties in the line of transmission, and he may acquire a good title even when his transferor had no title if there are elements of estoppel. (See Thompson, Corporations, 3rd Ed., Vol. 5, Sec. 3491, p. 331.) As long ago as the decision in Masury v. Arkansas National Bank et al., 93 Fed. 603, 607 (1899), public interest was recognized as requiring placing stock certificates as nearly as possible on the plane of commercial paper, the Court in that case stating:

"It is a well-known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued; that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by simple endorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper."

By the adoption of Uniform Stock Transfer Acts and "Blue Sky" Laws the states have done everything in their power to establish the soundness and ready negotiability of stock—to make the certificates circulate as money. The reservation of liens for inheritance taxes upon the transfer of stock is inconsistent with such treatment of them. It needlessly embarrasses and restricts their circulation and prevents their full use for legitimate business purposes. It hampers their use for financial and credit purposes. In so far as it permits inheritance taxation of them by two or more states, it amounts to deprivation of property without due process of law under the decision of this Court in the Farmers Loan and Trust case and should be definitely prevented.

No doubt theoretical legal distinctions can be made be-

tween stocks and bonds, but no sound distinction can be made between the privilege of the succession by the living to the legally protected interest of the dead in these two forms of intangible choses in action. Such privilege is the subject of an inheritance tax. And although these theoretical legal distinctions can be made, they are not greater than the distinctions between tangible and intangible property and do not justify subjecting stock to the harsh and discriminatory multiple inheritance taxation from which bonds, credits and notes have been recently relieved. (See Farmers Loan and Trust Co., Beidler and Baldwin cases, supra.)

It has been the tendency of this Court in recent years to permit only one inheritance tax upon the shifting of one economic interest in property. That tendency has prevented oppressive consequences and should be continued in respect of such taxation of stock.

(b) **The maxim, "mobilia sequuntur personam," applies to stocks and gives them a proper situs for inheritance tax purposes at the domicile of their owner.**

That the maxim, "mobilia sequuntur personam," applies to stocks and gives them a proper situs for inheritance tax purposes at the domicile of their owner was clearly held by this Court in Blodgett v. Silberman, 277 U. S. 1, 18, 72 L. Ed. 749, 760 (April 16, 1928). The full significance of this case has been called to this Court's attention on pages 9, 12, 19, 21 and 29 of the brief for the First National Bank of Boston and needs no further comment herein.

As no sound distinction can be made between the inheritance taxation of stocks and bonds, both should be taxed at the domicile of their owner. Such domicile has been chosen by all of the reciprocal states. The law of

such domicile governs the distribution of such property (Harrison et al. v. Nixon, 9 Peters 483, 504, 9 L. Ed. 201, 209; Ennis et al. v. Smith et al., 14 Howard 400, 424, 425, 14 L. Ed. 472, 483; Eidman v. Martinez, 184 U. S. 578, 592, 46 L. Ed. 697, 704, and Bullen v. Wisconsin, 240 U. S. 625, 631, 60 L. Ed. 830, 835). And such law governs to the extent of enjoining executors and legatees from proceeding in foreign courts until the rights of legatees have been determined in the court of the domicile, of determining whether a legacy to stock lapses or not, and of determining the validity of trusts relating to personalty and governing the interpretation of wills relating to that form of property (Woerner, The American Law of Administration, Third Edition, Vol. 3, Sec. 565, page 1930). It regulates the decision as to what constitutes the last will of the testator without regard of the place either of birth or death, or the situation of the personal property at the time (Woerner, The American Law of Administration, Third Edition; Vol. 2, Sec. 226, page 758). At such place the property interest passes in both stocks (In re Zook's Estate: Hibbard v. Thompson, 317 Mo. 986, 995, 996) and other intangibles (Farmers Loan and Trust, Baldwin and Beidler cases, supra). See, also, Direction der Disconto-Gesellschaft v. U. S. Steel Corp. et al., 267 U. S. 22, 28, 69 L. Ed. 495, 498, which is especially applicable where the stock certificates are kept in the decedent's domicile and the state of incorporation has not specifically reserved a lien for inheritance taxes. Furthermore, at the domicile of the decedent the privilege of succession is enjoyed (Mr. Justice [redacted]ne in Farmers Loan & Trust Co. v. Minn., 280 U. S., at p. 214).

(c) The view that two or more states may tax on different and more or less inconsistent principles the same testamentary transfer of stock produces discontent among states and has a bad practical effect.

Frick v. Pennsylvania, 268 U. S. 473, 497, 69 L. Ed. 1058, 1065, 1066 (June 1, 1925), lends support to the theory that both the domicile of the corporation and the domicile of the decedent can levy an inheritance tax upon stock owned by him at his death. This view is also supported by dictum in Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 81, 70 L. Ed. 475, 479 (March 1, 1926). As stock is universally included in reciprocal exemption statutes, it is clear that such statutes were passed to avoid the evil practical effect of the rule of the two cases mentioned above.

Furthermore, it is clear that inheritance taxation by the domicile, or domiciles, of a corporation of stock owned by a nonresident has a bad practical effect. Such taxation usually requires the taking out of ancillary administration, the hiring of local counsel, the furnishing of innumerable affidavits and papers to the local probate courts and the inheritance tax officials, and the payment of all the fees, costs and other expenses attendant upon such procedure. It, and feigned protection of local creditors, cause delay which necessitates keeping executors' bonds in force, prevents speedy distribution of the estate to those ultimately entitled thereto, hinders the executors in selling stock at advantageous times and prices and often causes the estate to lose credit for state inheritance taxes upon the federal estate tax, as the former taxes must be paid within three years after the federal estate tax return is filed if credit is to be allowed (26 U. S. C. A., Sec. 1093). The seriousness of these problems is increased where the decedent owns stock

in corporations incorporated in several states, or in many corporations incorporated in states other than his domicile. They illustrate that the heaviest burden imposed by inheritance taxation at the domicile of the corporation is not the payment to such state, but the expense of determining the amount of such payment. Such taxation at times approaches confiscation—amounts to spoliation in the guise of taxation. (See pamphlet of Finance Department of Chamber of Commerce of the United States, September, 1928, entitled "State Taxes Local, No. 4; State Inheritance Taxation [a method of simplification]; Report of Committee on State and Local Taxes and Expenditures.")

Conversely, subjecting stock to an inheritance tax at the domicile of its owner does not have such a bad practical effect. Assessment of the correct tax is facilitated because witnesses are available to prove or disprove that transfers were made in contemplation of death. Conflicting theories are avoided as to what constitutes transfers in contemplation of death and transfers taking effect in possession and enjoyment at death. Collection is easier for all of the assets of the estate can be reached to enforce payment thereof. All of the delays, expense and loss attendant upon taxation by the domicile, or domiciles, of the corporation are avoided. Only by giving the domicile of the decedent exclusive power to levy an inheritance tax upon stock (business situs excepted) can unjust and oppressive consequences of an extremely serious character be avoided.

(d) The theories upon which stock may be subjected to an inheritance tax at four places are based upon a wrong premise.

In the Farmers Loan and Trust case this Court called attention to the fact that under currently accepted the-

ories the testamentary transfer of bonds could be taxed (1) at the domicile of the owner, (2) at the domicile of the debtor, (3) at the place where the instruments are found—physically present, and (4) where the owner has caused them to become integral parts of a localized business. If the State of Maine is right in its contention that the Farmers Loan and Trust case does not apply to stock, then it is said that stock can be subjected to an inheritance tax at the same four places, viz.: (1) At the domicile of the owner (42 A. L. R., p. 330, and Blodgett v. Silberman, supra), (2) at the domicile of the corporation (42 A. L. R., p. 365, and see Frick v. Pennsylvania, supra), (3) where the certificates are found—physically present (42 A. L. R., p. 380), and (4) where the owner has caused them to become integral parts of a localized business (cf. Brief of Minnesota filed herein, p. 8).

The possibility of taxation of stock at four places is wholly unfair, oppressive and discriminatory when we consider that all other forms of property, real and personal, tangible and intangible, are subject to no such economic burdens.

It is unthinkable that due process of law would permit the corporate structure to be thus torn apart—would permit the bonds and debts of a corporation to be taxed only at the domicile of their owner, and at the same time consent to taxation of stock at four places. If one spoke of the economic wheel is taxed in one way, the other spokes of the same nature should receive like treatment.

If the possibility of such quadruple inheritance taxation of bonds is startling, it is equally startling in the case of stock. If it suggests the wrong premise in regard to such taxation of the former, it suggests an equally wrong premise in regard to such taxation of the latter. The need

for a uniform rule is the same in both cases. The need to end discrimination is just as great in the case of stock as of bonds. Justice and due process of law imperatively demand protection of stock against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. Fairness and due process of law imperatively demand that it be granted an immunity against taxation at more than one place similar to that accorded to tangibles.

(e) **The increasing importance of stock in our national life makes protection of it against discrimination and unjust and oppressive taxation a matter of greatest moment.**

In the Farmers Loan and Trust case this Court said that primitive conditions have passed, that business is now conducted on a national scale, and that a very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation is a matter of greatest moment (280 U. S., at pages 211 and 212).

Assuming that this Court had bonds in mind, we wish to point out that primitive conditions have also passed as to stock. In 1890 the total number of shares traded in on the New York Stock Exchange was 71,828,885 (New York Times of January 2, 1921, page 16). In 1930 the total number of shares traded in on the New York Stock Exchange and the New York Curb Exchange was 1,032,894,321 (New York Times of January 1, 1931, pages 48, 44). And certainly these figures also show that the business of trading in stock is conducted on a national scale. Moreover, we wish to call attention to the fact that much of the country's wealth is invested in stock—much more in fact than in bonds. On January 1, 1925, the total market value

of all stock listed on the New York Stock Exchange was $27,072,322,192—the total market value of all listed bonds being $33,611,817,346. On January 1, 1930, these figures had changed as follows: Total market value of all listed stocks, $64,707,872,131; total market value of all listed bonds, $46,892,458,780 (figures taken from New York Stock Exchange year book for 1929-1930).

We are becoming less provincial. Personal and proprietary interests overleap state boundaries with scant regard to their existence. State borders are no longer industrial boundaries. Corporations are created with power to engage in business in every state and foreign country. Private enterprise is being rapidly absorbed into great corporate undertakings. The increase in trade and banking and the growth of our manufactures since the World War tend to make wealth more intangible—tend to increase investments in stock.

Clearly it is a matter of greatest moment that stock be protected against discrimination and unjust and oppressive taxation. Regardless of the rules which were in force prior to this time, **existing** conditions demand that the doctrine of the Farmers Loan and Trust, Baldwin and Beidler cases be clearly applied to stock.

II.

THE DOCTRINE OF STARE DECISIS DOES NOT PREVENT THIS COURT FROM APPLYING THE PRINCIPLES OF THE FARMERS LOAN AND TRUST, BALDWIN AND BEIDLER CASES TO THE INHERITANCE TAXATION OF STOCK.

The cases most frequently cited to sustain the position which the States of Maine, Minnesota and Missouri have taken are: (a) Tappan v. Merchants National Bank, 19

Wall. (86 U. S.) 490, 22 L. Ed. 189 (1874); (b) Travelers Insurance Co. v. Connecticut, 185 U. S. 364, 46 L. Ed. 949 (1902); (c) Corry v. Baltimore, 196 U. S. 466, 49 L. Ed. 556 (1905); (d) Baker v. Baker, Eccles & Co., 242 U. S. 394, 61 L. Ed. 386 (1917); (e) Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058 (1925), and (f) Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 70 L. Ed. 475 (1926).

These cases can be distinguished generally by stating that they were all decided before 1930, when this Court in the Farmers Loan and Trust, Baldwin and Beidler cases first held that intangible property should be subject to an inheritance tax only at the domicile of the owner thereof—business situs excepted—and that when so taxed it, as in the case of tangibles, should be immune from taxation at another place. Not until 1930 did this Court thus establish that double inheritance taxation of intangibles is unconstitutional. Not until 1930 did this Court thus place intangibles upon the same plane with tangibles. In so far as these older cases are in confiict with the principles of the 1930 cases, they should be definitely overruled.

Furthermore, these cases may be specifically distinguished as follows:

(a) Tappan v. Merchants National Bank (1874), supra: In the first place, this case can be distinguished on the ground that it is based upon a disregard of the corporate fiction (see 86 U. S. [19 Wall.], at pp. 500, 503); which is no longer sanctioned by this Court (see Eisner v. Macomber, 252 U. S. 189, at p. 214; Rhode Island Hospital Trust Co. v. Doughton, 270 U. S., at pp. 81, 83, and Klein v. Board of Supervisors, 282 U. S. 19, at p. 24). The corporation is a person whose ownership is a nonconductor that

makes it impossible to attribute an interest in its property to its members. The shareholders do not own the corporate property. Secondly, the tax involved in the Tappan case was a direct property tax. Decisions with respect to the situs of property for purposes of such taxation are usually considered of little service in determining the situs of property for purposes of inheritance taxation (26 R. C. L., p. 209; cf. Buck v. Beach, 206 U. S., at p. 408). And finally another difference exists between the Tappan case and the case at bar. The Tappan case is based upon an express federal statute (see 12 U. S. C. A., Sec. 548), in effect, written into the charter of the bank, which authorized the tax involved. Without such special authorization no state tax could be levied (Talbott v. Board of Commissioners, 139 U. S. 438, 440, 35 L. Ed. 210, and Des Moines National Bank v. Fairweather, 263 U. S. 103, 106, 68 L. Ed. 191), and the provisions of the statute operate not only as an authorization, but also as a restriction against discriminatory taxation (see People v. Weaver, 100 U. S. 539, 543, 25 L. Ed. 705), and against such shares being taxed elsewhere than in the state where the corporate enterprise is located. The Tappan case stands for the proposition that the Federal Government created the bank as an instrumentality for the conduct of certain of its functions; that for that reason, and that reason only, states would not be permitted to tax without its authorization, and that in giving its consent it may provide the extent to which, and the jurisdictional basis upon which, a state may tax, and provide a reasonable means of restricting that taxation to a single jurisdiction. In the case at bar the State of Maine has not restricted the taxation of shares of stock in the Great Northern Paper Company to Maine, as Congress has done as to national bank

shares, a thing which Maine has no power to do, but is merely asserting that it will tax, by virtue of having created the corporation, regardless of where the owner may reside. It is submitted, therefore, that a denial of Maine's power to tax the testamentary transfer of the stock involved in the case at bar would not be inconsistent with a continuation of the existing doctrine with respect to taxation of shares of stock in national banks.

(b) Travelers Insurance Co. v. Connecticut (1902), supra: This case also involved a direct property tax. Moreover, the laws of Connecticut under which it was levied expressly provided that stock in Connecticut corporations should be transferable only on the books of the corporation, made the corporation liable for the tax on shares owned by nonresidents, and gave the corporation an express lien to enforce reimbursement therefor from such shareholders. If the contention of Maine and Minnesota in the case at bar is sustained upon the basis of this case, this Court should limit inheritance taxation by the domicile of the corporation to states where these same, or similar, statutory provisions are in force **at the time of incorporation.** In addition, the tax in the Travelers case was sustained in part on the ground that a nonresident shareholder should support the state which created and protected the corporation (see 185 U. S., at p. 368). This argument, although advanced by Mr. Justice Holmes in the Farmers Loan and Trust case, was not followed by the majority of this Court. Moreover, no argument was made in this case that the tax was a violation of due process of law, and it was not shown that the nonresident shareholders were subjected to a second tax upon their shares at their domicile.

(c) Corry v. Baltimore (Feb. 20, 1905), supra. This case also involved a direct property tax and specific statutes of the State of Maryland providing for the assessing and collecting of the tax in substantially the same manner as in the Travelers Insurance Company case. Such statutes also expressly fixed the situs of such shares in Maryland for such tax. (See 196 U. S., at page 472.) As above stated, a rule for inheritance taxation of stock, if based upon this case, should be confined to situations where similar statutes are involved. And it should be confined to situations where similar statutes were in force **at the time of creating the corporation** (Cf. remark of Mr. Justice White, 196 U. S., at page 477)—in force before foreign shareholders bought their stock expecting that it would not be subject to an inheritance tax at their death. Furthermore, in the Corry case no question was raised as to double taxation of the stock involved. Moreover, this case was decided before the adoption of Uniform Stock Transfer Acts—before stock was placed upon the same plane as commercial paper. And it was decided before a unit rule was adopted for the taxation of tangibles (see Union Transit Co. v. Kentucky [Nov. 13, 1905], 199 U. S. 194, 50 L. Ed. 150), and before intangibles and tangibles were placed upon the same basis by this Court in the Farmers Loan and Trust, Baldwin and Beidler cases. In short, it was decided under conditions which were radically different from those now prevailing.

(d) Baker v. Baker, Eccles Co. (1917), supra. This case is distinguishable on several grounds. First, it did not involve an inheritance tax upon stock, or, for that matter, any tax. The remark of Mr. Justice Pitney that a state which created a corporation has such control over the transfers of its shares that it may tax the succession (242 U. S., at page 401) is pure dictum. Second, this case cites

and relies upon Blackstone v. Miller (1903), 188 U. S. 189, 47 L. Ed. 439, which was definitely overruled by this Court in the Farmers Loan and Trust case. Third, the decedent who owned the stock was apparently a resident of the state of incorporation. And, fourth, the doctrine of this case should not be allowed to conflict with the later case of Direction der Disconto-Gesellschaft v. U. S. Steel Corporation, 267 U. S. 22, 69 L. Ed. 495 (1925).

(e) Frick v. Pennsylvania (1925), supra. This case can be distinguished upon the grounds mentioned on pages 11, 28 and 29 of the brief of the appellant in the case at bar. We will not repeat what has been said there. However, we wish to call attention to the fact that it can also be distinguished on other grounds. In it Mr. Justice Van Devanter characterized the inheritance taxes paid to West Virginia and Kansas, the states of incorporation, as **superior claims**; and said that to bring the stock in these corporations into administration in Pennsylvania, the domicile of the decedent, it was **essential** to pay an inheritance tax to West Virginia and Kansas (268 U. S., at pages 497 and 498). In part, he considered such West Virginia and Kansas inheritance taxes **superior claims** because the statutes of such states, to which he referred, gave those states the status of lienors in possession (268 U. S., at page 497, note 4). These statutes provided as follows: Kansas (Ch. 357, Laws Kan. 1915, p. 452 et seq.): Section 2, "* Property of which a decedent died seized or possessed, subject to a tax as aforesaid, in whatever form of investment it may happen to be * shall be charged with a **lien** for all taxes and interest thereon which are or may become due on such property. *" West Virginia (Hogg, W. Va. Code 1913, Vol. 1, c. 33, ss. 1306 et seq.): Section 7 (Sec. 1314):

"All such taxes upon any transfer shall, until paid, be and remain a **lien** upon the property transferred * and no title shall vest or be transferred as to any such property, except subject to the lien for such taxes *." These statutes expressly created liens for inheritance taxes. All states do not have such statutes. In some, Missouri, for example, the statute simply makes the executors and the corporation personally liable for the inheritance tax upon stock. Consequently if this case be deemed authority for allowing an inheritance tax by the state of incorporation, any such rule announced by this Court should be confined in its application to situations where express liens therefor are reserved. However, this Court cannot now consistently permit the domicile of the corporation to tax upon the sole ground of this reserved lien, for at the time the Farmers Loan and Trust case was decided the inheritance tax law of Minnesota provided: "Every tax imposed by this act shall be a **lien** upon the property embraced in any inheritance * bequest, legacy * until paid" (Mason's Minn. Statutes 1927, Vol. 1, Sec. 2297). This statute expressly created a lien in behalf of Minnesota for its inheritance tax upon the bonds involved in the Farmers Loan and Trust case. Clearly, then, this Court should not say that an inheritance tax can be levied by the state of incorporation simply because it has the status of a lienor in possession. Furthermore, the Frick case is not controlling because it was based upon Blackstone v. Miller, supra, and the theory that intangible personalty was on a different footing from tangible personalty (268 U. S., at page 494). This theory has been definitely repudiated. And, finally, if the Frick case is to control in the case at bar, then Blodgett v. Silberman, supra, should be definitely overruled, for two states should not be allowed to levy an

inheritance tax upon the testamentary transfer of the same stock.

(f) Rhode Island Hospital Trust Co. v. Doughton (1926), supra: This case is adequately distinguished on pages 29 and 30 of appellant's brief.

In its brief (p. 8) the State of Minnesota says that shares of stock owned by a nonresident may be said to have a business situs within the state of the corporation's domicile and thus become integral parts of some local business within the doctrine of the cases of New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174, and Liverpool and L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, and Bristol v. Washington County, 177 U. S. 133, 44 L. Ed. 701. It is difficult for us to understand the applicability of this argument, for we have been unable to find any cases where it has been applied to facts at all similar to those involved in the case at bar. "Business situs" means "a situs in another state where a nonresident is doing business through an agent or manager, in which business and as a part thereof the nonresident's property is used and comes within the protection of such state" (see Cooley, Taxation, 4th Ed., Vol. 2, p. 1032). In the case of a nonresident shareholder of a corporation, he cannot be held to do business in the state of incorporation simply because of his relation to the corporation. The corporation may do business in the state, but the nonresident shareholder does not. He is granted no franchises, pays no license fees, and is not subject to service of process in personal actions in said state. The corporation pays in full for all franchises granted to it. It is the business of the corporation and not the business of the shareholder which is protected by local law. The corporate fiction is a nonconductor behind which

we cannot look. The property of the shareholders in their respective shares is distinct from the corporate property and franchises (Hawley v. Malden, 232 U. S., at p. 9). Moreover, it is clear that the nonresident shareholder's stock—his chose in action against the corporation—is not used as a part of the business of the corporation. In addition, unless the stock certificate is kept in the state of incorporation, the paper itself is not protected by, or used in, that state. Perhaps it can be said that a nonresident shareholder does business in the domicile of the corporation by voting for the directors of the corporation. But what if the shareholder does not vote regularly? There is no business situs if the business is not continuous and permanent in character (Cooley, Taxation, 4th Edition, Vol. 2, p. 1037). And what shall be the rule if a bondholders' protective committee is in charge, or if the nonresident owns preferred or nonvoting common stock, or voting trust certificates? Perhaps, too, it may be said that the nonresident's stock has a business situs if he regularly attends shareholders' meetings in the state of incorporation. But what if he attends such meetings only irregularly, or not at all? What if the shareholders' meetings are regularly held outside of the state of incorporation as is the common practice in regard to Delaware corporations? And if we say that stock has a business situs in the domicile of the corporation simply because it is stock in the corporation, shall we say that that fact prevents the certificate from having a business situs at the place where they are pledged as collateral for loans, or at the place where they have become a part of the corpus of an active trust? These consid-

erations make it clear that the doctrine of business situs should not be applied in the case at bar.

In Minnesota's brief filed herein (p. 10) it is suggested that the Farmers Loan and Trust decision should not be applied to stock because a nonresident who owns real estate can escape taxation at the situs thereof by incorporating his holdings. This may be true, but it is also true that a state which permits incorporation charges large amounts as incorporation fees, franchise taxes, and ordinarily imposes income taxes upon the corporation. These fees and additional taxes are an adequate quid pro quo for all of the privileges granted to the shareholders of the corporation. Furthermore, it is clear that the iron mine itself does not circulate freely as negotiable paper in the financial and credit markets of the country at places far removed from its physical location.

CONCLUSION.

Under the authority of the Farmers Loan and Trust, Baldwin and Beidler cases this Court should hold that the testamentary transfer of stock is taxable only at the domicile of its owner, except, possibly, where the certificates are actively used as a part of a business of the shareholders in another state, or form a part of the corpus of a trust in such other state. Only in this way can unjust and oppressive double taxation of such intangibles be avoided. Only in this way can the present confused and chaotic condition of inheritance taxation be ended. And only in this way can justice and fairness be done to the taxpayer. Such taxation, when based solely on power, prevents the smooth

working of the federal system. The rule of stare decisis does not prevent such a decision.

Respectfully submitted,

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